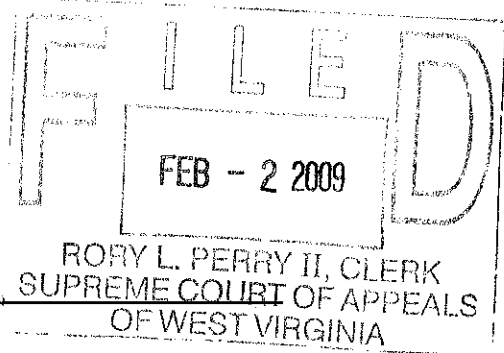


IN THE  
SUPREME COURT OF APPEALS  
OF  
WEST VIRGINIA

\_\_\_\_\_  
**Charleston**  
\_\_\_\_\_



John R. Mullens, Defendant Below,  
Appellant

v.

APPEAL NO. 34584

State of West Virginia, Plaintiff Below  
Appellee

**APPELLANT BRIEF  
ON BEHALF OF JOHN R. MULLENS,  
APPELLANT**

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**Charleston**

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John R. Mullens, Defendant Below,  
Appellant

v.

Appeal No. 34584  
Underlying Proceeding  
Case No. 07-M-AP-13  
Fayette County Circuit Court

State of West Virginia, Plaintiff Below  
Appellee

**APPELLANT BRIEF ON BEHALF OF JOHN R. MULLENS, APPELLANT**

**INTRODUCTION**

The circumstances surrounding this case exemplify the very “evil” that both the United States Supreme Court and the West Virginia Supreme Court of Appeals have consistently guarded against, namely the unbridled discretion of police officers whose conduct is not guided by standards, guidelines, or procedures. This case of seemingly first impression challenges the constitutionality of an indiscriminate “administrative check” or “safety check” roadblock when it is done solely to circumvent the written policy of a police agency relating to sobriety checkpoints and conducted further to evade supervisory permission, relief of public notification, and prosecutorial authorization.

Appellant was convicted by a Fayette County Magistrate for first offense of driving under the influence of alcohol on November 29, 2007, even though the

secondary chemical test evidence was not admitted because the breathalyzer was not certifiable in accordance with 64 CSR 10, 6.1. Appellant alleged during the Magistrate Court proceedings that the Fayette County Sheriff's Department, without any observable deviation or violation of traffic regulations or laws, lacked probable cause to stop the Appellant's vehicle. Appellant argued that the Fayette County Sheriff's Department failed to follow its departmental written policy in regard to sobriety checkpoints and were in fact operating a spontaneous so-called "safety" or "administrative checkpoint" roadblock, which, given the circumstances surrounding the event, Appellant believes to be illegal and unconstitutional.

This matter was timely appealed to the 12<sup>th</sup> Judicial Circuit. The case was submitted to the Honorable Judge Paul M. Blake, Jr., upon a stipulated finding of facts with the sole issue being whether or not probable cause existed for the traffic stop. By Order entered February 26, 2008, the Circuit Court found that the Fayette County Sheriff's Department had probable cause to stop the vehicle.

The Appellant appeals the ruling of the Fayette County Circuit Court's upholding the constitutionality of an indiscriminate "administrative" or "safety" checkpoint roadblock.

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A direct appeal from the Circuit Court of Fayette County

STATE OF WEST VIRGINIA

Appeal No. 34584

v.

Fayette County Circuit Court  
Case No. 07-M-AP-13

JOHN R. MULLENS

#### **I. KIND OF PROCEEDING AND NATURE OF RULING BELOW**

Appellant was arrested on September 29, 2007, for the misdemeanor offense of driving under the influence of alcohol, first offense. He had, earlier that evening, joined friends for dinner at a local restaurant known as Smokey's on the Gorge—a facility operated by Class VI River Runners. At approximately a few minutes past 10 p.m., Appellant was traveling east to Route 19 when he encountered two Fayette County Deputy Sheriff's standing in the approximate middle of Ames Heights Road, each officer holding a flashlight. As a result of the stop, Appellant was arrested for first offense driving under the influence. A Magistrate Court hearing was held on November 28 and 29, 2007, and following the two-day bench trial the Appellant was convicted of the offense even though the secondary chemical test evidence was inadmissible due to its lack of compliance with WV 64 CSR 10, 6.1. Counsel for Appellant argued before the Fayette County Magistrate Court that the police officers circumvented the written departmental policies and state law by conducting what, in actuality, amounted to a sobriety checkpoint without public notification or prosecutorial authority. Appellant verily

believes that such checkpoints or roadblocks are conducted routinely in Fayette County in circumvention of written sobriety checkpoint policy. On December 17, 2007, Appellant filed an appeal to the Fayette County Circuit Court. Based upon a Stipulation of Facts submitted to the Fayette County Circuit Court by the Appellant's Counsel and the Fayette County Prosecuting Attorney, and, after mature consideration, the Circuit Court affirmed the Magistrate Court's earlier conviction.

## **II. STATEMENT OF FACTS**

The Appellant submits to the West Virginia Supreme Court of Appeals the Stipulation of Facts that had been agreed upon jointly by the Appellant's Counsel and the Prosecuting Attorney of Fayette County as proffered to the Circuit Court of Fayette County for consideration by the 12<sup>th</sup> Judicial Circuit for appeal purposes and as modified by the Circuit Court. (See Appellant's Exhibit 1)

1. On Saturday evening September 29, 2007, a few minutes past 10 p.m., the [Appellant] defendant was traveling east on Ames Heights Road, Fayette County, West Virginia, driving a 2003 model Jeep Wrangler, silver in color.
2. In front of the former convenient/grocery store located east of the split of Ames Heights Road, Possum Creek Road, and Burma Road, and approximately one-half mile from Class VI River Runners and Smokey's on the Gorge, two human figures stood in the approximate middle of the roadway, each holding a flashlight.
3. Within coming of an approximate 75 feet of the individuals, the [Appellant] defendant discerned the individuals were wearing police officer uniforms. Such officers were part of a four-man unit assigned to such area.
4. A Fayette County Sheriff's Department cruiser was backed onto the eastern end of the former store's parking lot. Its emergency blue lights were not in use, not flashing.

5. The two individuals stood approximately fifty feet apart and were dressed in light-weight, summer uniforms—absent were the bright orange, reflective safety vest that police officers commonly wear in traffic situations.
6. There were neither roadsides flares nor other cautionary lights to indicate to passing motorists that anything was amiss and that, in fact, traffic was being stopped.
7. There was no roadside sandwich board indicating "Safety Check Point Ahead" or "Be Prepared to Stop."
8. As the defendant approached, the first individual (later to be identified as Deputy Sheriff Steven L. Yarber, Jr.) shone his flashlight into the windshield of [Appellant's] defendant's vehicle and held up his hand as an indication to stop.
9. The [Appellant] defendant stopped his vehicle beside Deputy Yarber.
10. Deputy Yarber stepped toward the [Appellant's] defendant's vehicle and requested to see driver's license, registration, and proof of insurance.
11. As the defendant gathered the registration and insurance cards from the glove compartment and his license from his wallet, Deputy Yarber physically pressed his torso against the driver's door of the vehicle. Deputy Yarber testified that he detected the order of alcohol coming from the [Appellant's] defendant's vehicle.
12. The [Appellant] defendant produced the three requested documents.
13. Deputy Yarber asked the driver if he was the person identified in the license. The [Appellant] defendant replied, "Yes, sir, I am."
14. The vehicle's state inspection sticker, license plate decal, and registration card were current and valid. There were no burn-out headlights, taillights, or any other malfunctioning equipment on the vehicle.
15. Due to the smell of alcohol coming from [Appellant] defendant or his vehicle, Deputy Yarber asked the [Appellant] defendant to pull his vehicle onto the parking lot of the defunct convenient/grocery store.
16. The [Appellant] defendant drove off the roadway and onto the parking lot.
17. Deputy Yarber walked to the vehicle and asked the [Appellant] defendant to exit his vehicle, and [Appellant] defendant complied.



18. Deputy Yarber asked the [Appellant] defendant if he had been drinking. The [Appellant] defendant replied, "Not really." Deputy Yarber responded, "Either you have or haven't. Which is it? It doesn't matter, really. I can smell alcohol. I need to do a sobriety test."
19. The second individual (later identified as Deputy Sheriff Patrick Jeb McCutcheon) walked from the road onto the parking lot and joined the [Appellant] defendant and Deputy Yarber after the [Appellant] defendant had exited the vehicle.
20. Deputies testified in Magistrate Court that they met at 4:00 p.m., at the beginning of their shift of work, at the Fayette County Filed office and decided to conduct the traffic check that evening, September 29, 2007. Such operation began at approximately 5:00 p.m. The operation, designated by officers as an administrative road check, was discussed with and approved by Cpl. S. L. Campbell, Shift Supervisor.
21. Both Deputies testified that the alleged "administrative road check" disbanded and resumed "several" times throughout the evening as they were dispatched by 911 to handle emergency calls.
22. From approximately 10:10 p.m. to 10:45 p.m., from the time of initial contact with the [Appellant] defendant through the arrival of City Wrecker Service, three vehicles drove past the alleged "administrative road check," –two vehicles traveling east to west, and one vehicle traveling west to east.
23. The Fayette County Sheriff's Department has a detailed, written policy on sobriety checkpoint stops. There is no written policy on "Administration Safety Road Check." (See Appellant's Exhibit 2)

### **III. ASSIGNMENT OF ERROR AND THE MANNER IN WHICH THEY WERE DECIDED**

A. The trial Court erred in failing to grant Appellant's relief from a Magistrate Court appeal challenging the legality of an alleged "safety" or "administrative checkpoint" roadblock in that the Circuit Court found that probable cause did exist for stoppage of the vehicle.

#### IV. POINTS AND AUTHORITIES

1. "This holding does not preclude the State of Delaware or other States from developing methods for spot checks that involve less intrusion that do not involve the unconstrained exercise of discretion. Questioning of all oncoming traffic at roadblock-type stops is one possible alternative." *Delaware v. Prouse*, 440 U.S. 648 at 661

2. "[I]n judging the reasonableness, we look to [1] the gravity of the public concerns served by the seizure, [2] the degree to which the seizure advances the public interest, and [3] the severity of the interference with individual liberty." *Illinois v. Lidster*, 540 U.S. 419 at 420

3. "[B]ecause the checkpoint program's primary purpose is indistinguishable from the general interest in crime control the checkpoints violate the Fourth Amendment." *City of Indianapolis v. Edmond*, 531 U.S. 32 at 48

4. "[M]otorists may be stopped for no other reason than examination of licenses and registrations when such examinations are done on a random basis pursuant to a preconceived plan, such as stopping of every car at a checkpoint, the examination of every car on a given day with a particular letter or number in the license, or any other nondiscriminatory procedure." *State v. Frisby*, 161 W.Va. 734 at 738

5. "[T]he flashing blue lights of the police vehicles and the directing of traffic by officers alerted approaching drivers of the existence and location of the roadblock. In fact, the roadblock was placed within the Town of Marlinton, rather than upon a remote

highway and, was, thus, less intimidating to drivers. There is no evidence that the roadblock was conducted in an unsafe manner.” *State v. Davis*, 195 W.Va. 79 at 84

6. “[The Court was] not called upon to directly explore the constitutional implications of the possible use of game-kill checkpoints or roadblocks. However, we note that in the analogous context of so-called ‘sobriety checkpoints,’ we have held that such ‘roadblocks are constitutional when conducted with predetermined operational guidelines which minimize the intrusion on the individual and mitigate the discretion vested in police officers at the scene.’ *Carte v. Cline*, 194 W.Va. 238, 460 S.E. 2d at 53. The defendant sought through the Freedom of Information Act any operational guidelines used by the Department of Natural Resources in conducting game-kill surveys. Unfortunately, the Department indicated that none exist. In this regard, operationalization of W.Va. Code, 20-4-7(5) [1994] would suggest that the Department of Natural Resources promulgate policies and procedures that satisfy constitutional protections against unreasonable searches and seizures.” *State v. Legg*, 207 W.Va. 686 at footnote 11 following page 695

7. [C]ontrary to our decision in *Downey*, the roadblock was operated with little regard to the safety of approaching motorists. . . . Further contrary to *Downey*, the officers placed no advanced warning signs giving approaching motorists notice of the upcoming roadblock. Not only is this requirement especially important to ensure the safety of motorists, but the presence of advanced warning signs also ‘reassure[s] motorists that the stop is duly authorized,’ thereby diminishing the possibility of surprise, concern, or fright.” *State of Tennessee v. Hicks*, 55 S.W. 3d 515 at 533 and 534

8. "Without evidence that [police] were using an objective, nondiscretionary procedure . . . the initial stop of [Appellant's] automobile violated the Fourth Amendment." *Simmons v. Commonwealth*, 238 Va. 2000; 380 S.E. 2d 656 at 659

9. [Virginia State Troopers] "set up a 'checking' detail or roadblock . . . in Dinwiddie County. The troopers stopped all vehicles entering the checkpoint and inspected drivers' licenses and equipment." *Simmons v. Commonwealth*, 238 Va. 2000; 380 S.E. 2d 656 at 657

10. "We do not read Prouse to stand for the proposition that stopping all traffic at a roadblock constitutes sufficient restraint on the exercise of discretion by police officers to transform the stop into a constitutionally valid roadblock." *Simmons v. Commonwealth*, 238 Va. 2000; 380 S.E. 2d 656 at 659

11. "[T]he trial court, in considering the constitutionality of the checkpoint, failed to make findings of fact regarding the 'primary programmatic purpose' of the checkpoint required by *City of Indianapolis v. Edmond*, 531 U.S. 32 . . . and failed to conduct the separate analysis of the reasonableness of the checkpoint mandated by *Illinois v. Lidster*, 540 U.S. 419. . . ." *North Carolina v. Rose*, 170 N.C. App. 284 at 285

12. "[W]e conclude that this checkpoint was no properly conducted so as to limit the troopers' discretion at the scene or to maximize public safety in any way." *Monin v. Commonwealth of Kentucky*, 209 S.W. 3d 471 at 474.

13. "Trooper . . . explained that the checkpoint was immediately disbanded when Monin was arrested and had to be transported." *Monin v. Commonwealth of Kentucky*, 209 S.W. 3d 471 at 474.

14. "In determining the constitutionality of a driver's license checkpoint, a court must evaluate, on a case-by-case basis, the checkpoint's intrusion on privacy, the state's interest in maintaining the checkpoint, and the extent to which the checkpoint advances the state's interest." *Ohio v. Orr*, 91 Ohio St. 3d 389 at 390.

## **V. ARGUMENT**

**The Court erred in upholding the constitutionality of an indiscriminate "administrative" or "safety" checkpoint roadblock in finding that there was probable cause for Appellant's stop.**

Appellant firmly believes that the stop of his vehicle on September 29, 2007, was unconstitutional and illegal in accordance with the Fourth Amendment of the Constitution of the United States and with Article III, Section 6 of the West Virginia State Constitution. The primary and principal case for police agencies to stop motorists is *Delaware v. Prouse*, 440 U.S. 648-667 (1978). In *Prouse*, the Court maintained that arbitrary, random stops for the purposes of checking driver's license and vehicle registration are in violation of the U.S. Constitution. The Court further noted, "This holding does not preclude the State of Delaware or other States from **developing** [emphasis added] methods for spot checks that involve less intrusion that do not involve the unconstrained exercise of discretion. Questioning of all oncoming traffic at

roadblock-type stops is one **possible** [emphasis added] alternative” at 663. As more recent rulings indicate, however, to assert that the latter solitary criterion within and of itself was intended or suggested to become the singular standard upon which all such roadblocks would be afforded constitutional protection is unsound reasoning.

In *Illinois v. Lidster*, 540 U.S. 419 (2004), a case involving a checkpoint for information purposes concerning the events of a hit-and-run accident, the Court stressed and reaffirmed the three-prong analytical assessment found originally in *Brown v. Texas*, 443 U.S. 47 (1979). “[I]n judging the reasonableness, we look to [1] the gravity of the public concerns served by the seizure, [2] the degree to which the seizure advances the public interest, and [3] the severity of the interference with individual liberty.” *Lidster*, 540 U.S. at 420. After an analysis applying the three-layer method, the Court found the constitutionality could be upheld in the instance of *Lidster*. The Appellant Lidster, as he approached the checkpoint, established at the same location and same time of the accident but one week later, swerved his van, nearly hitting one of the officers, which gave additional probable cause for the DUI investigation that ensued.

In *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), the Court found that a checkpoint designed for narcotics determent, with secondary purposes of checking for sobriety and driver’s license and vehicle registration, did not meet constitutionally standards, even though the city had a developed, detailed written plan for carrying out such roadblocks including a predetermined number of vehicles to be stopped. Edmond and Joell Palmer—though convicted of no crime—claimed such checkpoints violated theirs (and the class of all motorists’) Fourth Amendment right, and the Court upheld

their position. As the Court noted, “[B]ecause the primary purpose of the Indianapolis checkpoint program purpose is ultimately indistinguishable from the general interest in crime control, the checkpoints violate the Fourth Amendment.” *Id.* at 48.

The West Virginia Supreme Court has acknowledged the need for rules and regulations governing sobriety checkpoints and did incorporate within its findings in *Carte v. Cline*, 194 W.Va. 233, 460 S.E. 2d 48 (1995), the guidelines as adopted by the West Virginia State Police. *Id.* at 234, 235. Appellant maintains that such need for written policy was adopted by the Fayette County Sheriff’s Department for sobriety checkpoints. (See Exhibit 2) It is, however, common place practice for police agencies to avoid the stringent requirements of sobriety checkpoints by erroneously claiming that the roadblock’s purposes are for license, vehicle registration, and insurance verification. Appellant further maintains that without any direct written policy the Fayette County Sheriff’s Department did establish an “administrative check” or “safety” checkpoint roadblock not to apprehend safety violators but to check for other offenses, including alcohol related violations. Officers, according to testimony given in Magistrate Court, did not issue any citations for safety violators on the evening in question even though violations were presented. Officers, rather, issued warning tickets (T: McCutcheon, 10), and, thus, failed to pass the second-prong analysis of *Lidster* scrutiny.

The West Virginia Supreme Court of Appeals first addressed checkpoints established for verification of drivers’ license and registration in *State v. Frisby*, 161 W.Va. 734, S.E. 2d 622 (1978), in which the West Virginia Court maintained, “[M]otorists may be stopped for no other reason than examination of licenses and

registrations when such examinations are done on a random basis pursuant to a preconceived plan, such as stopping every car at a checkpoint, the examination of every car on a given day with a particular letter or number in the license, or any other nondiscriminatory procedure. “ Id. at 625. *Frisby* involves a motorist, eventually charged with possession of marijuana with intent to deliver, whose vehicle carried an obscure and out-of-state license plate. The Court deemed that stoppage of the vehicle for investigating the vehicle’s registration and the Appellant *Frisby*’s license was reasonable.

The West Virginia Supreme Court further addressed so-termed “administrative” or “safety” checkpoints in *State v. Davis*, 195 W.Va. 79 (1995), and did in that case maintain that checkpoints were permissible under the circumstances existing in the case. The Court, however, did take specific note that:

[T]he flashing blue lights of the police vehicles and the directing of traffic by officers alerted approaching drivers of the existence and location of the roadblock. In fact, the roadblock was placed within the Town of Marlinton, rather than upon a remote highway and, was, thus, less intimidating to drivers. There is no evidence that the roadblock was conducted in an unsafe manner. Id. at 84

As the facts of the case make known, the Appellant *Davis*’s approach to the checkpoint was “excessively slow” and, moreover, *Davis* stopped “some thirty feet away” (Id. at 81) from the designated mark, giving rise to suspicion within its own right. The circumstances in the case now before the West Virginia Supreme Court of Appeals are vastly different: Two police officers stood in the middle of a secondary roadway and stopped traffic via flashlights. Although a Fayette County Sheriff’s Department cruiser was on the scene, its official emergency blue lights were not activated, not in use (T:



McCutcheon, 14). The Appellant in the case now before this Court, furthermore, stopped when and where directed by the officer. *Davis*, in deeper *Lidster* analysis, confirms the inter-agency cooperation of the Marlinton City Police, the Pocahontas County Sheriff's Department, and the West Virginia State Police. There was not a spontaneous, haphazard, spur-of-the-moment, intra-agency meeting. Perhaps more importantly, *Davis* also demonstrates a clear-cut balance of city, county, and state authority with an implicitness of checks and balances, and further illustrates that supervisory level personnel not only participated in the planning but assisted in the execution of the checkpoint roadblock.

We are advocating that this Court adopt safety checkpoint standards, or other similar guidelines, to govern "administrative" or "safety" checkpoint roadblocks. The Charleston Police Department, for example, out of an abundance of precaution, provides public notice of seatbelt checkpoints, and that department has adopted the guidelines governing sobriety checkpoints to conduct such operations, understanding apparently that any checkpoint is likely to encounter violators of different sorts. (See Exhibit 3) The Appellant notes that in *State v. Legg*, 207 W. Va. 536 S.E. 2d 110 (2000), the West Virginia Supreme Court footnoted a similar response:

"[The Court was] not called upon to directly explore the constitutional implications of the possible use of game-kill checkpoints or roadblocks. However, we note that in the analogous context of so-called 'sobriety checkpoints,' we have held that such 'roadblocks are constitutional when conducted with predetermined operational guidelines which minimize the intrusion on the individual and mitigate the discretion vested in police officers at the scene.' *Carte v. Cline*, 194 W.Va. 238, 460 S.E. 2d at 53. The defendant sought through the Freedom of Information Act any operational guidelines used by the Department of Natural Resources in conducting game-kill surveys. Unfortunately, the Department indicated

that none exist. In this regard, operationalization of W.Va. Code, 20-4-7(5) [1994] would suggest that the Department of Natural Resources promulgate policies and procedures that satisfy constitutional protections against unreasonable searches and seizures.” *State v. Legg*, 207 W.Va.; 536 S.E. 2d 110, [fn. 11] (2000)

States within a close geographical proximity of West Virginia, during the past two decades or so, have developed and adopted guidelines and procedures that direct police officers in conducting roadblocks specifically targeted for the verification of drivers’ license and vehicle registration. Virginia State Police Memo 1987 #3, for example, prescribes the guidelines for such state police conducted “traffic-checking” details. See *Hall v. Commonwealth of Virginia*, 12 Va. App. 972 (Va. App. 1991); 406 S.E. 2d 674 (1991). In Kentucky, State Police General Order OM-E-4 sets forth similar guidelines for the establishment and operation of drivers’ license checkpoints. See *Monin v. Commonwealth of Kentucky*, 209 S.W. 3d 471 at 473 (2006). In Tennessee, checkpoint operations are governed by the characteristics prescribed by the Supreme Court of Tennessee. See *State of Tennessee v. Hicks*, 55 S.W. 3d 515 (2001) and *State of Tennessee v. Downey*, 945 S.W. 2d 102 (1997).

In the case now before the West Virginia Supreme Court of Appeals, a Fayette County deputy sheriff testified, when asked the difference between sobriety checkpoints and “administrative” or “safety” checkpoint roadblocks, that sobriety checkpoints had to be advertised and to have administrative approval (T: McCutcheon, 12). He further stated that, according to his understanding, as long as two officers were present at the scene it was within the authority of the police agency to set up such roadblocks anywhere with the county (T: McCutcheon, 17). Moreover, officers, according to their own testimony (T: McCutcheon, 12, 13, 14, 15; Yarber, 33) were not responding to an

outcry of community concerns or even to an individual complaint but rather relied on their own discretion for the determination of the roadblock location, which happened to be one-half mile east of Class VI River Runners and Smokey's on the Gorge on a Saturday night during the height of the Gauley River rafting season. The officer included "suspended driver's licenses" and "dead inspection stickers [and] dead registration" (T: McCutcheon, 15) as part of his reasoning for suggesting and selecting the checkpoint roadblock site. The Appellant maintains that a suspended driver's license would not be immediately discernable without other violations present that required checking the status of an individual's license. It should be further noted that the officer did not indicate and specifically name a motorist without a license. A "dead" registration would correlate with a "dead" license's plate decal. Both decals and State inspections stickers are color specific for easy detection, and both are observable offenses. The first-prong of the *Lidster* analysis, then, would suggest that at least part of the gravity of the situation was not pressing.

The Supreme Court of Tennessee, in a case involving a checkpoint for drivers' license and vehicle registration, ruled that the two factors critical to finding if officers' discretion was limited, thus checkpoints are afforded constitutional protection, are whether (1) the decision to set up the roadblock was made by the officers actually carrying it out and (2) whether officers on the scene could decide for themselves the procedures to be used in the operation of the checkpoint. See *State of Tennessee v. Hicks*, 55 S.W. 3d 515 (2001) at 535. In *Hicks*, a motorist was stopped at a drivers' license checkpoint roadblock and marijuana was discovered on the front seat of the vehicle. Because the stop was not in alignment and conformity with guidelines set forth

in *State of Tennessee v. Downey*, 945 S.W. 2d 102 (1997), the Supreme Court of Tennessee upheld the suppression of the evidence. *State of Tennessee v. Hicks*, 55 S.W. 3d 515 (2001) at 519.

In reaching its decision in *Hicks*, the Tennessee Court further noted:

[C]ontrary to our decision in *Downey*, the roadblock was operated with little regard to the safety of approaching motorists. . . . Further contrary to *Downey*, the officers placed no advanced warning signs giving approaching motorists notice of the upcoming roadblock. Not only is this requirement especially important to ensure the safety of motorists, but the presence of advanced warning signs also 'reassure[s] motorists that the stop is duly authorized,' thereby diminishing the possibility of surprise, concern, or fright." *State of Tennessee v. Hicks*, 55 S.W. 3d 515 at 533 and 534

Here, then, is the third-prong of the *Lidster* analysis in the case presently before the West Virginia Supreme Court of Appeals. With no advanced warning, with no flashing emergency blue lights from the police cruiser, and with two individuals (indiscernible at first, to be sure) standing in the approximate middle of a secondary roadway holding flashlights, the Appellant ask this Court to envision the surprise, concern, alarm, fear, and fright accumulated into one emotion.

In *Simmons v. Commonwealth*, 380 S.E. 2d 656 (1989), the Virginia Supreme Court determined that, "Without evidence that [police] were using an objective, nondiscretionary procedure . . . the initial stop of [Appellant's] automobile violated the Fourth Amendment." *Id.* at 659. In *Simmons*, Virginia State Troopers "set up a 'checking' detail or roadblock . . . in Dinwiddie County. The Troopers stopped all vehicles entering the checkpoint and inspected drivers' licenses and equipment." *Id.* at 657. The Court, in its deliberation, noted, "We do not read *Prouse* to stand for the

proposition that stopping all traffic at a roadblock constitutes sufficient restraint on the exercise of discretion by police officers to transform the stop into a constitutionally valid roadblock.” Id. at 658.

The North Carolina Appellant Court more recently concurred. In *North Carolina v. Rose*, 170 N.C. App. 284 (2005), the Court noted that the stopping of “all oncoming traffic at the checkpoint . . . [is] a circumstance that by itself is not enough to uphold a checkpoint.” Id. at 295. The case concerns a roadblock set up by the Onslow County Sheriff’s Department (the purposes of which are not immediately apparent). Appellant Rose, who was stopped at the checkpoint, was convicted eventually on four counts, including felony manufacturing of marijuana. In its ruling, the Court held that “the trial court, in considering the constitutionality of the checkpoint, failed to make findings of fact regarding the ‘primary programmatic purpose’ of the checkpoint required by *City of Indianapolis v. Edmond*, 540 U.S. 419 . . . and remand[ed] for further findings of fact in accordance with *Edmond* and *Lidster*.” *North Carolina v. Rose*, 170 N.C. App. 284 (2005), at 285 and 286.

In *Monin v. Commonwealth of Kentucky*, 209 S.W. 3d 471 (2006), the Court of Appeals of Kentucky reversed the Marion County Circuit Court’s affirmation of the appellant’s conviction of driving under the influence of alcohol after the appellant had been stopped at a purported license checkpoint roadblock. In so finding, the Court noted, “[W]e conclude that this checkpoint was not properly conducted so as to limit the troopers’ discretion at the scene or to maximize public safety in any way.” Id. at 474. In its deliberation, the Court additionally considered such factors as the checkpoint’s compliance with OM-E-4 (Kentucky’s Traffic Safety Checkpoint Policy), although

concluding that perfect compliance is not necessarily fatal. The Court further noted that, "There was obviously no concerted planning to maintain the checkpoint since it was immediately abandoned when Monin was arrested." *Id.* at 474. The "Trooper . . . explained that the checkpoint was immediately disbanded when Monin was arrested and had to be transported." *Id.* at 473. This case has much in common with the case now before the West Virginia Supreme Court of Appeals. As a Fayette County deputy sheriff testified in Magistrate Court, after the Appellant's arrest the roadblock ceased (T, McCutcheon: 18).

The Ohio Supreme Court recently held that, "In determining the constitutionality of a driver's license checkpoint, a court must evaluate, on a case-by-case basis, the checkpoint's intrusion on privacy, the state's interest in maintaining the checkpoint, and the extent to which the checkpoint advances the state's interest." *Ohio v. Orr*, 91 Ohio St. 3d 389 (2001) at 390.

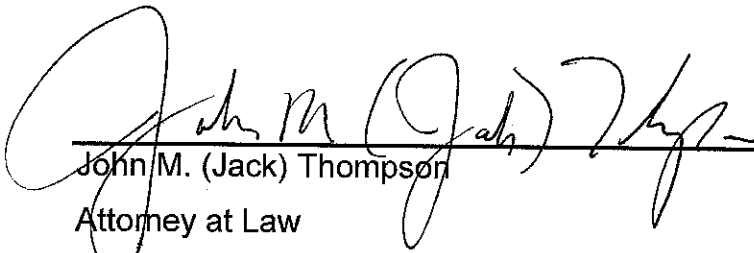
## **CONCLUSION**

For the foregoing reasons, the Appellant emphatically believes that the stop of his vehicle on September 29, 2007, was illegal and unconstitutional and, as such, constituted a seizure by the Fayette County Sheriff's Department. Appellant further believes that the 12<sup>th</sup> Judicial Circuit erred in upholding the Magistrate Court's conviction, and Appellant prays the West Virginia Supreme Court of Appeals will set aside the conviction.

**Respectfully submitted,**

John R. Mullens

By Counsel



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### **CERTIFICATE OF SERVICE**

I, John M. (Jack) Thompson, Counsel of Record for John R. Mullens, hereby certify that on this day of 30 January 2009, I served a copy of the foregoing Appellant's Brief on Behalf of John R. Mullens, Appellant, upon the following at their respective addresses and in the manner noted below:

Carl L. Harris, Esquire  
Fayette County Prosecuting Attorney's Office  
108 East Maple Avenue  
Fayetteville, WV 25840

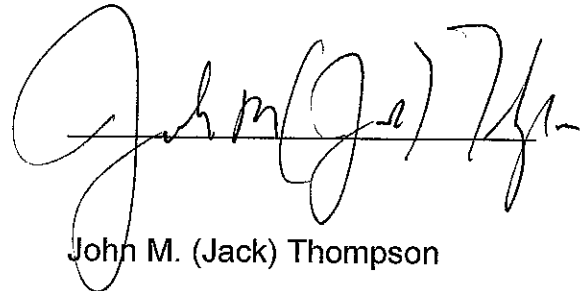
Via US Mail

Dawn E. Warfield, Esquire  
Deputy Attorney General  
State of West Virginia  
Office of the Attorney General  
Charleston, WV 25305

Via US Mail

John R. Mullens  
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Summersville, WV 26651

Via US Mail

A handwritten signature in black ink, appearing to read "John M. (Jack) Thompson". The signature is written in a cursive style with a horizontal line drawn through the middle of the letters.

John M. (Jack) Thompson  
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**EXHIBITS**  
**ON**  
**FILE IN THE**  
**CLERK'S OFFICE**